



Rooney, J. (2019). Case Review: Extraterritorial corporate liability for environmental harm: Okpabi v Royal Dutch Shell. *Northern Ireland Legal Quarterly*, 70(1), 157-162.
<https://nilq.qub.ac.uk/index.php/nilq/article/view/237>

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LEGISLATION, TRENDS AND CASES

Cases

Extraterritorial corporate liability for environmental harm:

Okpabi v Royal Dutch Shell

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Introduction

On 14 February 2018 the Court of Appeal confirmed in *Okpabi v Royal Dutch Shell*¹ that English courts could not exercise jurisdiction over the matter of whether the parent company, Royal Dutch Shell (RDS), owed a duty of care towards the people of the Ogle Community affected by the contamination of waterways by oil spills, as a result of deep-water oil exploration in the Niger Delta by its subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC).

This case note considers how *Okpabi* establishes a curtailment of the precedent set in *Lungowe v Vedanta*² for ensuring accountability of home corporations in English courts. *Okpabi* provides further evidence of the ineffectiveness of tort law to ensure that English domiciled parent companies take measures to prevent against harm to the health, safety, and environment of communities affected by the extraterritorial operations of their subsidiaries.

1 The facts

In *Okpabi*, the claimants alleged that RDS was negligent in failing to maintain the oil pipeline operated by its subsidiary SPDC in the Niger Delta to acceptable standards and failing to protect it from interference by third parties engaging in bunkering – the unlawful siphoning-off of oil.³ The oil ‘contaminated the land, swamps, groundwater and waterways’, and the water could not be used for ‘drinking, agricultural, washing or recreational purposes’ affecting over 40,000 people.⁴ RDS argued that English courts could not exercise jurisdiction because there was ‘no real issue’ to be tried between the claimants and the parent company,⁵ and that the claimants were merely using proceedings against the parent company as a device to exercise jurisdiction over SPDC.⁶ Therefore, in

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1 *Okpabi v Royal Dutch Shell plc* [2018] EWCA Civ 191.

2 *Lungowe v Vedanta Resources plc and Konkola Copper Mines plc* [2017] EWCA Civ 1528.

3 *Okpabi* (n 1) para 8.

4 *Ibid* para 9.

5 Civil Procedure Rules, Part 11(1).

6 *Okpabi* (n 1) para 5.

order to decide whether English courts had jurisdiction over the case, the court had to determine whether there was an arguable case of a duty of care owed by RDS to the claimants based upon the preliminary evidence.⁷

2 The judgment

The court examined whether there was foreseeable damage, a relationship of proximity, and whether it was ‘fair, just and reasonable’ to impose a duty of care to establish whether there was jurisdiction over the parent company.⁸ While the court found the damage foreseeable, the main focus of the judgment was proximity. The court confirmed⁹ that the test for proximity was *Chandler v Cape*,¹⁰ which concerned a parent company’s liability for its subsidiary’s treatment of its employees. In order for liability to arise, the parent company must have taken ‘direct responsibility for devising a material health and safety policy, the adequacy of which is the subject of the claim’ or ‘control . . . the operations which give rise to the claim’.¹¹

Lord Justice Simon acknowledged RDS’s mandatory health and safety standards and policies,¹² the imposed system of mandatory design and engineering practices,¹³ the imposed system of supervision and oversight in implementing RDS’s standards,¹⁴ RDS’s financial control over SPDC in relation to the allegations of negligence,¹⁵ and centralisation of security matters.¹⁶ However, in the case of RDS, the concern had been ‘to ensure that there were proper controls and not to exercise control’, thus falling short of the proximity requirement in *Chandler* to ‘control operations’.¹⁷ Further, a distinction had to be made ‘between a parent company which controls, or shares control of, the material operations of a subsidiary, on the one hand, and a parent company which simply issues mandatory policies as group-wide operating guidelines for its subsidiaries’.¹⁸ A duty of care would not arise as a result of the parent company merely establishing health and safety guidelines to which all subsidiaries had to conform. If mandatory policies were directed towards a particular subsidiary, then a duty of care was more likely to arise.¹⁹ Despite the fact that RDS had specific concerns regarding SPDC in Nigeria, as evidenced in its 2014 Sustainability Report,²⁰ RDS did not take ‘direct responsibility’ for the practices and failures of SPDC.²¹ In response to the claimant’s argument that it was fair, just and reasonable to require RDS to take reasonable care to mitigate foreseeable harm created by SPDC – as it would not subvert or compromise the Nigerian statutory scheme and RDS had made billions of pounds of profit from SPDC’s operations²² – Lord Justice

7 Ibid 84.

8 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

9 *Lungowe* (n 2) para 83.

10 *Chandler v Cape* [2012] EWCA Civ 525, para 80.

11 *Okpabi* (n 1) para 49.

12 Ibid paras 90–9.

13 Ibid paras 100–08.

14 Ibid paras 109–13.

15 Ibid para 114.

16 Ibid para 116.

17 Ibid para 125.

18 Ibid para 89.

19 Ibid para 129.

20 Ibid paras 90–9.

21 Ibid para 127.

22 Ibid para 130.

Simons responded that he did not find these matters ‘persuasive’.²³ The court therefore declined jurisdiction on the grounds that there was no arguable case of a duty of care owed by RDS to the claimants.

3 Case Analysis

3.1 CLARIFICATION OF *LUNGOWE V VEDANTA*

The decision provides clarification of the precedent in *Lungowe v Vedanta*.²⁴ That case was significant for declining to stay proceedings on the basis of *forum non conveniens*, a common law doctrine which entails that courts can refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties. The court in *Lungowe* read Article 4 of the Parliament and Council Regulation (EU) No 1215/2012²⁵ as precluding English courts from declining what was a mandatory jurisdiction where the defendant was a company domiciled in England and Wales.²⁶ Sufficient proximity was established between the parent company, Vedanta, and the claimants, local residents in Nchanga, Zambia, whose waterways had been contaminated by harmful effluent discharged during the mining operations carried out by Vedanta’s subsidiary company, Konkola Copper Mines. A decisive factor contributing to a finding of proximity was Vedanta’s governance framework setting out mandatory health, safety and environmental policies and standards.²⁷ The Court of Appeal in *Okpabi* claims to confirm the *Chandler v Cape* test. However, it departs from that test by denying that issuing inadequate standards can give rise to parent company liability, instead requiring active control over the subsidiary’s actions.²⁸ The judgment demonstrates that the level of control required to secure jurisdiction over the parent company is a high threshold and cannot depend merely on health and safety guidelines directed at the overall group of subsidiaries.

3.2 SHORTCOMINGS OF TORT LAW AS A REGULATORY FRAMEWORK

Okpabi provides evidence of the inability of tort law to ensure English domiciled parent companies take measures to prevent against harm to the health, safety and environment of communities affected by the extraterritorial operations of their subsidiaries. The case demonstrates that parent corporations are more likely to be liable in tort the more they attempt to alleviate environmental harm, thus encouraging corporations to desist from exercising due diligence in relation to the operation of their subsidiaries. This is contrary to the due diligence requirement of corporations to take measures to avoid infringements of human rights enshrined in the non-binding, but authoritative, UN Guiding Principles on Business and Human Rights and Organisation for Economic Co-operation and Development (OCED) and Guidelines for Multinational Enterprises.²⁹ Further, a tort law framework means that the larger the scale of atrocity committed by the subsidiary, the less likely the claimants will have access to English courts. In order for a duty of care to arise

²³ Ibid para 131.

²⁴ *Lungowe* (n 2).

²⁵ Article 4, Parliament and Council Regulation (EU) No 1215/2012, 12 December 2012: ‘Subject to the Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

²⁶ *Lungowe* (n 2), citing *Owusu v Jackson* [2005] 2 WLR 942, [2005] ECR I-1383.

²⁷ *Lungowe* (n 2) para. 84.

²⁸ Amnesty International, ‘Rule 15 submission to Supreme Court of the United Kingdom by Amnesty International: *Okpabi and others vs Royal Dutch Shell plc and another* UKSC 2018/0068’ (26 April 2018) 3.

²⁹ See, for example, UN Guiding Principles on Business and Human Rights 17–24; OECD Guidelines for Multinational Enterprises, 23–4.

in tort, the defendant's actions must result in losses to claimants 'of a kind in respect of which damages are recoverable'.³⁰ Lord Justice Simon found that the claimants who owned land in the vicinity of the pipeline which was damaged from the oil spill was not a sufficiently defined group of people affected for the purposes of establishing a duty of care. He stated it was important to distinguish between a 'duty owed to a particular person or class of persons' from 'abstract concepts of moral responsibility', including to reduce global warming and protect the environment.³¹ Further, a parent company is more likely to be held liable in tort if only one of its subsidiaries causes particular concern, rather than all of its subsidiaries or a significant number of them, as a result of the 'fair, just, and reasonable' requirement that the damage be recoverable. The more widespread and systemic the harm to peoples' health and environment, the less likely the court will have jurisdiction to hear a case.

Denial of jurisdiction in the home state of the parent company in practice means that access to justice is denied to victims of the subsidiary's harmful activities. Structural problems including 'a weak rule of law, corruption, lack of independence of the courts and corporate capture' mean that victims cannot access justice in the state hosting the subsidiary corporation and where the harmful activity takes place.³² The duty of care test applied in *Okpabi* effectively gives rise to corporate immunity as a result.

3.3 AN ALTERNATIVE REGULATORY FRAMEWORK: HUMAN RIGHTS LAW?

Whether an emphasis on the international human rights law framework could improve regulation and accountability of extraterritorial corporate environmental harm is contested. Unlike non-state actors – such as corporations, insurgents and international organisations – states have legally binding international human rights obligations: they are duty bearers of human rights when they become signatories to international human rights treaties and incur binding international legal obligations towards the right bearers. While the UN Guiding Principles and OECD Guidelines use the language of human rights to denote the harm committed by corporations, under international law 'non-state actors . . . do not violate the relevant human right—it was never their obligation to secure or ensure it'.³³ The UK is a signatory to the European Convention on Human Rights (ECHR), which is incorporated in domestic law through the Human Rights Act (HRA) 1998. The UK Parliament requires courts to 'take into account' the jurisprudence of the European Court of Human Rights (ECtHR) when determining whether the state has committed a violation of its obligations under the HRA 1998.³⁴

While the ECtHR recognises that states have negative obligations to not interfere with the rights of inhabitants on their territory, it also imposes certain positive obligations on the state to ensure that third-party, non-state actors are prevented from committing harms against individuals. This includes an obligation to ensure that domestic law, regulating the relationship between private actors, prevents private actors from committing certain harms against individuals. In *Wilson v UK*,³⁵ the applicants alleged violations of their right to freedom of expression and assembly³⁶ when their employer corporation offered them financial incentives to renounce their right to engage in

30 *Okpabi* (n 1) para 134.

31 *Ibid* para 88.

32 Amnesty International (n 28) 2.

33 Jane Wright, *Tort Law and Human Rights* (Hart 2017) 23.

34 HRA 1998, s 2.

35 *Wilson v UK* [2002] ECHR 552, paras 41, 48.

36 Articles 10 and 11 ECHR.

collective bargaining with their trade union. This was not illegal under the UK Act of Parliament, the Trade Union and Labour Relations (Consolidation) Act 1992, which regulated work relations between employees and employers. However, the ECtHR ruled that the UK had a responsibility 'to secure to the applicants *under domestic law* the rights set forth in article 11 of the Convention'.³⁷ A violation arose as a result of the lack of prohibition in domestic law for corporations to take measures to incentivise employees to forfeit trade union participation. The UK has positive obligations under the HRA 1998 to ensure that its domestic legal frameworks prevent corporations from committing harm contrary to human rights standards expected in a member state of the ECHR.

States are required to take reasonable measures to prevent corporations committing environmental harm in their own territories.³⁸ For example, in *Tatar v Romania*,³⁹ a violation of the ECHR arose as a result of a cyanide spill in a goldmine owned and operated by a private corporation: 100,000 cubic metres of contaminated water were released into rivers crossing Romania, Hungary, Serbia and Bulgaria. The applicants claimed that the operation of the mine entailed serious risks to human life and health, infringing upon their right to respect for private and family life.⁴⁰ The state was found to have failed in its positive duties to carry out effective regulation of the activities of the mining corporation and in its rejection of several administrative and criminal complaints made by the claimants. The state failed to provide proper avenues for compensation and criminal complaints.⁴¹ This demonstrates that there is the potential to hold member states accountable for failing to prevent corporate environmental harm.

The ECtHR is yet to impose positive obligations to prevent extraterritorial corporate environmental harm. In order for the ECHR to be applicable extraterritorially, the state must exercise either 'effective control over the territory' or 'state agent authority and control'.⁴² Therefore, the ECtHR's approach to the extraterritorial application of human rights is of 'limited value to the business and human rights domain because it is premised on the physical presence of State agents outside the State's territory'.⁴³

However, there is an increasing international trend towards imposing positive obligations on the state to prevent extraterritorial corporate environmental harm.⁴⁴ This is relevant to the ECtHR because it uses international law standards to ensure evolutive treaty interpretation that keeps up to date with contemporary attitudes about what should be the scope of human rights protection.⁴⁵ On 7 February 2018, the Inter-American Court of Human Rights (IACtHR) issued an advisory opinion on whether states had obligations under the American Convention on Human Rights (ACHR) in relation to extraterritorial environmental damage in the Wider Caribbean Region, carried out by

37 *Wilson* (n 35) para 41 (emphasis added).

38 See further *Oneryildiz v Turkey* (2005) 41 EHRR 20; *Lopez v Spain* (1995) 20 EHRR 277.

39 *Tatar v Romania* App No 67021/01, ECtHR, 27 January 2009.

40 Article 8 ECHR.

41 This case is available in French, Italian, Romanian and Russian. For a useful summary of the case see: James Harrison, 'International Law: Significant Environmental Cases 2008–09' (2009) 21(3) *Journal of Environmental Law* 501.

42 *Al Skeini v UK* (2011) 53 EHRR 18, paras 133, 138.

43 Daniel Augenstein and Lukasz Dziedzic, *State Obligations to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights* (European University Institute Working Paper Law 2017/15 2017) <http://cadmus.eui.eu/bitstream/handle/1814/48326/LAW_2017_15.pdf?sequence=1&isAllowed=y>.

44 See, for example, James Harrison, 'Significant International Environmental Law Cases 2017–18' (2018) 30(3) *Journal of Environmental Law* 527.

45 See e.g. Julian Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' (2012) 37(2) *Brooklyn Journal of International Law* 627, 627.

corporations situated in their territories.⁴⁶ This was a case concerning transboundary environmental harm, meaning that a corporation situated within the territory of the member state was committing environmental harm against individuals situated in a different territory. However, the principles on the extraterritorial application of the ACHR were quite expansive. It stated that:

The activities undertaken in the jurisdiction of one State party shall not deprive other States of their capacity to ensure that persons under their jurisdiction enjoy their rights under the Convention . . . it is understood that the person whose rights have been breached fall within the jurisdiction of the State of origin if there is a causal link between the facts occurring in its territory and the violation of the human rights of person outside its territory.

It is the State in whose territory or in whose jurisdiction these activities are undertaken, who has effective control over them and is in a position to prevent the causation of transboundary damage that may affect the enjoyment of human rights of individuals outside its territory. The potential victims of the negative consequences of these activities should be deemed to be within the jurisdiction of state of origin for the purposes of any potential state responsibilities for failure to prevent transboundary damage.⁴⁷

This advisory opinion is progressive insofar as it requires a 'causal link between the facts occurring' in the respondent state and the violation of the human right in a different territory rather than requiring the state's presence in the extraterritorial territory. The 'facts occurring' is quite a broad criterion and could include, arguably, a domestic regulatory framework that fails to hold home state corporations accountable for the activities of their subsidiaries, but this is not stated explicitly and the case concerns transboundary activity. The test limits itself to only protecting individuals in extraterritorial territories that are also member states of the ACHR, rather than territories outside of the Inter-American system. If this test was adopted by the ECtHR, the UK could not be held accountable for human rights abuses happening in the Niger Delta.

Conclusion

Enforceable human rights obligations appear to have the potential to hold states accountable for extraterritorial corporate environmental harm, including for failing to provide an adequate regulatory framework that disincentivises corporations to be negligent in relation to their extraterritorial activities. On assessment of the *Okepabi* case, human rights could impose an obligation on the state to produce a legislative framework regulating private actor behaviour that is in conformity with human rights standards. While international human rights law has not quite reached the point of imposing enforceable international obligations on states, one could speculate, considering the direction of international human rights litigation, that it may become a reality in the foreseeable future.

46 IACtHR, Environment And Human Rights Advisory Opinion Oc-23/17, 15 November 2017.

47 Ibid paras 101–02. The original judgment is only available in Spanish. This translation is taken from: Giovanni Vega-Barbosa and Lorraine Aboagye, 'Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights' (*EJIL: Talk!*, 26 February 2018) <www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights>.